Nos. 22188 and 22188-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,188

BEVERLY J. McCONNELL,

Appellant,

vs.

ESTATE OF BUTLER,

Appellee,

and

No. 22,188-A

OSCAR STROBLE, TRUSTEE,

Appellant,

vs.

ESTATE OF BUTLER,

Appellee.

On Appeal From the United States District Court for the District of Arizona.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Introductory Statement.

Beverly J. McConnell, the attorney for the Trustee of the estate of the bankrupt, E. W. Reynolds Company, has been designated as the Appellant by her counsel, and the Estate of Butler has been designated the Appellee in appellate proceedings No. 22,188. While Miss McConnell is the person who claims to be aggrieved by that portion of the order of the Referee in Bankruptcy for allowance of her fees and may be properly

designated as an Appellant, the designation of the Estate of Butler as the sole Appellee in both proceedings is probably legally incorrect and factually in error.

The largest single creditor (total allowed claim $139,-211.26) of the bankrupt's estate is Gladys Reynolds Butler the Executrix of the Estate of Walter H. Butler, Deceased. While Mrs. Butler in her representative capacity was the leading objector to the claims of Miss McConnell, she was by no means the sole objecting creditor, and, therefore, if she in her capacity as Executrix is a proper appellee, she is not the sole appellee in proceedings No. 22,188. The original objections were made for the benefit of all creditors, and this brief is also being filed for and on their behalf in proceedings No. 22,188. Neither Mrs. Butler nor the Estate of Butler is an appellee in proceedings No. 22,188-A, which is the Appeal of the Trustee from the portion of the Referee's order relating to the allowance of the claims of the debenture holders, and as to this matter Mrs. Butler takes no position.

Statement of Issues.

The sole issue involved in proceedings No. 22,188 is whether the Referee abused his discretion in the determination and allowance of fees to the attorney for the Trustee.

In arguing this issue we are faced with not having a complete record on appeal as there is neither a transcript of the testimony of the witnesses nor an agreed statement of facts.

The Certificate of Review filed by the Referee contains a summary of the facts and other portions of the record on appeal shed further light on this issue, how-

ever Appellant's brief contains many statements and assertions without support either in the available record or in the evidence and testimony introduced before the Referee. To effectively reply to such a brief we shall be obliged to state some facts for which there will be no supporting evidence in the record on appeal.

Statement of Facts.

The accompanying brief filed on behalf of the debenture holders in proceedings No. 22,188-A sets forth the history and background of E. W. Reynolds Company and the facts which led finally to its adjudication in bankruptcy.

The corporation was adjudicated a bankrupt and the Receiver was appointed on July 5, 1963. Oscar Stobel was appointed the Receiver, and Appellant, Miss McConnell, became the attorney for the Receiver.

After the adjudication in bankruptcy the business was continued on a very limited basis for a short period of time in an effort to sell it as a going business. There were no buyers for the company as a going business, and the tangible assets of the bankrupt's estate (no realty was involved) were disposed of in two sales, 1) a bulk sale of all of the inventory, and 2) a sale of all of the furniture and fixtures. The firm name and any good will attached to it were sold with the merchandise inventory.

Following these two sales, which took place less than two months after the adjudication in bankruptcy, the sole remaining activity of the Trustee was the collection of accounts receivable. [Referee's Findings of Fact ¶III and ¶V.] The only legal problem of consequence arising during the administration was the issue

which was recently raised as to the status of the creditors' claims based on unpaid debentures issued in 1956 by the bankrupt. [Referee's Cert. of Review, last page, lines 21-23, Clk. Tr. p. 6.]

It appears from the Trustee's accounting that by far the greatest part of the accounts receivable were collected by the end of January, 1965, less than a year and one-half following the beginning of collection activities by the Trustee. It should be pointed out that this year-plus period is not an indication of difficulties in making collections of the accounts receivable. The credit terms extended to the customers of the bankrupt were for very long periods in many instances, some being on the basis of promissory notes of varying periods from six months to fifteen months or more, others on a so-called 6/6 plan where a customer would make purchases for six months and then would have the following six months period to pay off the account. Thus, collection of some accounts or notes would extend over a year or more without any delinquency being involved.

The evidence shows that only 13 lawsuits were filed in efforts to make collections of accounts receivable, 7 in Arizona and 6 in California. Few, if any, of these cases actually went to trial. The total of the demands in the Arizona cases was $7,117.80, of which about $6,958.55 was collected. The total of the demands in the 6 California cases was $16,407.52 of which $1,503.52 has been recovered. Accounts receivable of an unknown face amount were referred to out-of-state collection agencies or collection attorneys, which resulted in collection of a gross amount of about $26,000 of which over $5,000 was paid to the collection agencies or collection attorneys in California.

Some indication of the collection activity can be gained by looking at the lists of accounts receivable attached to the Debtor's Petition. There the accounts were classified and divided into four groups. Group I were accounts on regular terms. This Group numbered about 280 with a total outstanding of $31,559.05, and of this total only about ¼th were delinquent, all the rest current. Group II were those on special or extended terms and numbered slightly under 100. The total outstanding was $94,974.50. Of these all but about ¼th were current. No analysis of the accounts listed in Groups III and IV was made. They were classified as doubtful of collection, and the total outstanding in these two groups was $162,219.35.

During the period of receivership, the principal employees of the company stayed on duty and continued to function under the authority of the Receiver. The transition was thereby made very smoothly and the records maintained in good order, greatly simplifying the transfer to the Receiver's and Trustee's accountant, one William Price.

Thus from the foregoing it is evident that no difficulties were encountered in the handling and administration of the estate or in the liquidation of the tangible assets, and that no special efforts were required in the liquidation of the accounts receivable. It was a routine bankruptcy administration.

ARGUMENT.

Fixing of Attorneys' Fees in Bankruptcy Is Peculiarly Within the Discretion of the Referee, and the Referee's Judgment Will Not Be Set Aside on Appeal Unless Clearly Erroneous.

Generally speaking, a bankruptcy referee's fact findings must be upheld by the Court of Appeals on appeal from a District Court's order confirming a Referee's order, unless they are clearly erroneous. See *Federal Rules of Civil Procedure,* §52(a), 53(e)(2); *General Order in Bankruptcy No. 47,* 11 USCA following §53; *Engelbrecht v. Bowen,* 300 F.2d 891 (9th Cir. 1962); *Farmer Bros. Co. v. Huddle Enterprises, Inc.,* 366 F. 2d 143 (9th Cir. 1966); *Cedar-Comp Materials Co. v. Bumb,* 344 F. 2d 256 (9th Cir. 1965); *Tepper v. Chichester,* 285 F. 2d 309 (9th Cir. 1960); *Hoppe v. Rittenhouse,* 279 F. 2d 3 (9th Cir. 1960).

Moreover, discretionary orders made by a referee will not be reversed in the absence of a clear abuse of discretion. See *In re Sanborn,* 96 Fed. 511; *In re Belknap,* 96 Fed. 614.

And, according to *In re Dole Company,* 244 F. Supp. 751, 754:

> "It is the universal rule that the fixing of attorneys' fees in bankruptcy is peculiarly within the discretion of the referee and the referee's judgment, if sufficiently supported by evidence and free from error of law, ought not to be disturbed unless it is so manifestly inadequate as to constitute an obvious miscarriage of justice. [Citing cases]."

In the Absence of a Transcript of Testimony or an Agreed Statement of Facts as Part of the Record on Appeal, the Summary of Evidence as Contained in the Referee's Certificate Must Be Relied Upon, and Where Such Certificate Contains Sufficient Substantial Evidence to Support the Findings of Fact and Conclusions of Law, the Order of the Referee Must Be Affirmed.

The review on appeal of an order in bankruptcy is restricted to the record. *United States v. Goggin,* 187 F. 2d 530 (1951, C.A. 9th) *Remington On Bankruptcy,* §3441, Vol. 8, page 342 and cases cited.

In *Farmer Bros. Co. v. Huddle Enterprises, Inc.,* 366 F. 2d 143 (9th Cir. 1966) the court stated that since the appellant did not furnish the District Court with a reporter's transcript of the testimony, the Circuit Court must rely upon the contents of the Referee's Certificate. And, since the Certificate On Review in the instant case [Clk. Tr. pp. 1, *et seq.*] contains substantial evidence to support the Referee's findings, the Circuit Court is required to accept the findings of the Referee in bankruptcy.

Comments on Findings and Evidence.

Appellee, while convinced that this court does not have a sufficient record on which to predicate a reversal or modification of the portion of the Referee's order relating to allowance of fees to the attorney for the trustee, desires to point out from the available record that the Referee's order is well supported by his Findings of Fact, by the evidence set forth in his Certificate on Review and by the available record. Comments with respect to the several contentions of Appellant are set forth below under descriptive headings.

Interest Earned.

One of the principal items urged in the Appellant's brief as entitling her to more fees is the item of interest earned on funds in the hands of the Trustee. First, the available record shows that the arrangement for the deposit of the funds of the bankrupt's estate in a savings account was made while Miss McConnell was acting as attorney for the Receiver, before the appointment of the Trustee, and before she became attorney for the Trustee. In Schedule "A" attached to Miss McConnell's Petition Of Attorney For Receiver For Allowance of Compensation, etc. [see Clk. Tr. pp. 72 and 73] she set forth time charge items for preparation of a petition and order authorizing transfer of funds to a savings account and for conferences with the bank and accountant regarding this deposit of funds. Thus, this matter was handled and disposed of before Appellant became the attorney for the Trustee and is not properly an item to be considered here where we are concerned only with her claims for fees as attorney for the Trustee.

Even so, we believe it to be a matter of common knowledge that 4% interest is a common or ordinary rate of interest paid on savings accounts by banks. The fact that $30,000 in interest was earned on money on deposit, rather than being a circumstance or result on which to claim fees for extraordinary services on the part of the attorney, is merely indicative of the long period of delay in the handling and disposition of money which belonged to the creditors and should have been distributed to them. The retention of this large amount of cash in a savings account rather than being a benefit to the creditors was a detriment as it can be safely

asserted that there was not one creditor of the bankrupt who would not have preferred to have had his share of the money and to have put it to use rather than leaving it with the Trustee earning only 4% per annum for the better part of four years.

There is nothing in the record which supports the argument of the Appellant that the interest earned was the result of some extraordinary service on her part or came about because of her standing, prestige or ability. On the contrary, the record shows otherwise. Furthermore, the record fails to show that Miss McConnell rendered any services in this regard while acting as attorney for the Trustee.

Sales of Assets.

The Appellant also seeks to take special credit for the amounts received on the sales of the merchandise inventory and the furniture and fixtures by comparing the sale prices with the estimated values placed on these items by the bankrupt and by an appraiser. Suffice it to say that the merchandise inventory and the furniture and fixtures were sold as the result of bids in open court in two sales, both within 30 days after the appointment of the Trustee. The fortuitous circumstances which resulted in sales for amounts in excess of the estimated values can hardly form the basis for a claim for legal fees. There is nothing in the record to indicate that the amounts received, even though in excess of the estimated values placed on these items by the bankrupt and the appraiser, were greater than the market value of the property being sold, or, that the activities of the Appellant were responsible for the amounts received on these sales. Assertions to this af-

fect have and will be made by Appellant as intimations along these lines have already been made in the Opening Brief, however neither the record nor the evidence will support such assertions.

The failure of E. W. Reynolds Company, which was the oldest and largest wholesale jewelry distributor in the southwestern United States, had such an impact on the wholesale jewelry distribution business and was so well known nationwide in the industry (through Oneida and International Silver Companies, General Electric Appliance Division, Timex, and Waltham Watches) that there was not an interested or prospective buyer who was not aware of the availability for purchase of the merchandise inventory and the furniture and fixtures.

It is submitted that no extraordinary services were rendered by Appellant nor any special benefit received by the estate from her services in connection with the sales of the bankrupt's tangible assets.

Proposed Sale of Accounts Receivable.

Appellant also seeks to take credit for the fact that a proposed sale of all of the accounts receivable for $29,500 was blocked by reason of her objections. This item is treated in the Appellant's Opening Brief as though she were solely or largely responsible for preventing this sale, and she also stated that the then Referee was in favor of the sale, and "reluctantly authorized the Trustee to collect the accounts receivable, rather than confirm a sale of same." (Appellant's Op. Br. p. 4, lines 14-24.)

Appellant's assertions and intimations are not in accord with the facts or the testimony. It was Mr. Hus-

on, the Chairman of the Creditors' Committee, who strongly objected to the proposed package sale of all of the bankrupt's accounts receivable. While Miss McConnell, as the attorney for the Trustee, may have joined with Mr. Huston in his objections, she was most certainly not the principal moving force. On the contrary, she had, in advance of the hearing, prepared a petition and order for the sale of the receivables presumably with the idea of using the documents. [See p. 10, line 22, of Schedule "A" to Petition Of Trustee's Attorney for Compensation, etc., Clk. Tr. p. 55.] It does not seem reasonable that Miss McConnell, if she were going to "vigorously" oppose the package sale of all the accounts receivable, would prepare a petition *and order* for such sale in advance of the creditors' meeting at which the matter was to be considered. Such advance preparation would suggest that both the Trustee and Miss McConnell, if not in favor of the sale, were certainly not opposed. It would also suggest that her later opposition was in the nature of a "leap onto the bandwagon".

Additionally, it should be pointed out that of the $126,000 of active receivables, 75% were current. One could reasonably expect to collect $90,000 to $100,000 out of these receivables with little or no effort other than the sending of statements. One might also expect to collect some part of the remaining $162,000 of inactive receivables. Anyone with reasonable business judgment would conclude that an offer of $29,500 for accounts receivable of an old established business of the face value of over $288,000 of which almost $100,000 were then current, is an offer which should be rejected out of hand.

It is straining rather hard for the attorney for the Trustee to take credit for and claim benefit to the bankrupt's estate in joining in objections to a sale which, if it had been made, would probably have subjected the Trustee to severe criticism if not a charge of mismanagement.

Collection of Receivables.

The other major item on which Miss McConnell claims entitlement to fees is the handling of the accounts receivable.

Appellant, in support of her claim for more fees, attempts to use collection agency standards and percentages. Such a basis is entirely inappropriate. Collection agencies or collection attorneys are not retained or employed to collect accounts receivable which are current or which are not badly delinquent. They are given and employed to handle those accounts which the creditor has not been able to collect by the use of ordinary or regular collection efforts employed by business.

An analysis of the results of the entire collection effort reveals that nothing out of the ordinary was accomplished; rather, the collection effort produced disappointing results and at substantial cost over and above the fees allowed to the Trustee, to the accountant Mr Price, and to Miss McConnell.

The evidence showed that 7 actions were commenced by Miss McConnell in Arizona (not 11 as asserted in Appellant's Op. Br. p. 15, lines 20 and 21), which re

ulted in collections of slightly less than $7,000 ($6,-)58.55), not $59,638.85 as suggested in Appellant's)pening Brief (p. 5, lines 13-18, and p. 15, lines 21-?8). (This last-mentioned sum was the total amount ollected by the Trustee's efforts; the balance of about $26,000 was realized from the accounts referred to California collection agencies.) Few, if any, of these ac-ions ever went to trial. [Ref. Cert. on Rev., ¶2, p. 5, Clk. Tr. p. 5.]

Selected accounts were referred to collection agen-ies in California and collections of $26,000 were ef-ected at a cost to the estate of over $5,000. There is no evidence in the record of the face value of these accounts and presumably no better percentage of face value was realized from these accounts than from the collection effort as a whole.

The accounts receivable were classified by the bank-rupt into Groups I, II, III and IV. Group I accounts were active, regular accounts, and Group II were ac-ive special accounts with extended terms such as the 5/6 plan (buy for six months, pay the next six months), or were on a note basis with up to 15 months to pay. In round figures, Group I had $31,500 outstanding and Group II had $95,000 outstanding. The face amount of the accounts receivable in Groups I and II was $126,533.55 at the time of the adjudication. In both of these groups, 75% of the accounts were cur-ent. Group III accounts were classified as doubt-ful, and Group IV accounts were classified as probably

uncollectible, however, none of the accounts in Group III and IV had been determined to be wholly uncollectible nor had they been written off. The face value of the accounts in Groups III and IV was $162,000. [Ref. Cert. on Rev., pp. 5 and 6, Clk. Tr. pp. 5 and 6.]

The collection efforts resulted in gross collections of slightly less than $90,000.

This is the result which is urged as requiring special recognition in the form of extra fees. If only the *current* accounts in Groups I and II were collected, the amount realized would have been $94,875.00 (75% of $126,500). These figures on the net collections would better support an assertion that the collection effort as to Group I and Group II accounts was both inadequate and ineffective and that little or no collection effort was made as to Group III and Group IV accounts. These figures certainly do not support Appellant's position that the collection efforts were exceptional and the results greater than could have been reasonably expected.

A comparison of the amounts collected from the accounts receivable with the estimated value placed on these accounts by the bankrupt only demonstrates the size of the error made by the bankrupt. It hardly supports the proposition that the Trustee's efforts produced exceptional results. The classification by the bankrupt of the active and inactive accounts receivable and the current or delinquent status of these accounts provided a much better guide to their value and collectibility.

Performance of Trustee's Duties by Appellant.

Appellant objects to the Referee's Finding that:

> "A substantial amount of the time and effort of the attorney for the trustee was spent in performing the duties of the trustee in administering the estate" (Appellant's Op. Br. p. 17).

Appellant follows this objection with the bold and bald statement: "We can find no justification at all in the record to support this finding."

The Referee's Certificate on Petition for Review constitutes part of the record, and a very substantial part as regards the issues of fact. The following is quoted from said Certificate, page 6, paragraph 3 [Clk. Tr. p. 6]:

> "3. Time Devoted—The Referee also considered the time spent by the attorney for the trustee, which time by the evidence presented approximated 200 hours. The Referee determined that a substantial portion of this time was actually spent by the attorney for the trustee in doing the work of the trustee and not a representative capacity."

Reference is also made to Schedule "A" to Petition of Trustee's Attorney for Allowance of Compensation, etc. [Clk. Tr. pp. 46-65] wherein there are *26* separate references in Miss McConnell's detailing of time charges to "Work On Receivables" or work with receivables exclusive of any reference to lawsuits or other special legal work. How much of the correspondence read or sent, also referred to in Miss McConnell's detailing of time charges in Schedule "A", was related to collection of receivables is not shown but it must

have been a large part as there was little activity in the estate administration following the sale of the tangible assets other than the collection of receivables.

Time Elements.

The time elements in this matter are two in number, one, the length of time it took to complete the administration, and two, the time spent by Appellant, Miss McConnell, as the attorney for the Trustee.

As to the first time element the only appropriate comments are that the creditor's money was and is being withheld from them for much too long a time, and the issues raised as to the debenture holders should have been raised and disposed of at least two years ago.

The other time element involves the time spent by Miss McConnell in performing her duties as attorney for the Trustee. The amount claimed and found to have been spent is about 200 hours. Of this total 165 hours was the subject of detailed itemization. [Schedule "A" to Petition of Trustee's Attorney for Compensation, etc., Clk. Tr. p. 46, *et seq.*] The balance spent subsequent to the filing of said petition.

Most of the work so detailed appears not only to be routine in nature but a great deal of the time spent appears to have been spent on collection of receivables. It is submitted that compensation at the rate of $40 per hour for this kind of work is adequate, if not generous.

Appellant's detailing figures for rent and other overhead expenses are not pertinent or relevant as it is a matter of common knowledge in the legal profession that these items of cost and the services of the attorney's secretaries and other non-legal personnel are included in his hourly charge.

It should also be noted that Miss McConnell was awarded $1,500 fees as the attorney for the Receiver. The receivership spanned a period of one month, July 5 to August 5, 1963. Though she claimed to have spent "approximately 70 hours" as the Receiver's attorney, her detail of her time charges in Schedule "A" to her Petition Of Attorney For Receiver For Allowance Of Compensation And Reimbursement [Clk. Tr. pp. 69-74] totals only 39 hours 10 minutes, again at a rate of about $40 per hour.

It is also noteworthy that the work performed during the period of the receivership included a much greater proportion of strictly legal services than the period during which Miss McConnell served as attorney for the Trustee. No appeal has been taken from the portion of the Referee's order awarding Miss McConnell fees as the attorney for the Receiver.

Conclusion.

It is submitted that the award of $8,000 to Miss McConnell for her services as attorney for the Trustee was adequate compensation for the services rendered.

It is submitted that there is ample evidence to support the Referee's Order making the award of attorney's fees.

It is also submitted that there is no showing of any abuse of discretion by the Referee in awarding attorney's fees as aforesaid, or that the Order of the Referee as confirmed by the District Court is "clearly erroneous".

Dated at Los Angeles, California, February 2, 1968.

Respectfully submitted,

BURRIS & LAGERLOF,
By STANLEY C. LAGERLOF,
Attorneys for Appellee, Gladys Reynolds Butler, Executrix of the Estate of Walter H. Butler, Deceased.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY C. LAGERLOF